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No. 82-271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CARLOS CHARDON, ETC., *et al.*, *Petitioners*,

v.

JUAN FUMERO SOTO, *et al.*, *Respondents*.

On Writ of Certiorari To The United States Court of Appeals for The First Circuit

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the rule established by this Court in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), that the filing of a purported class action in federal court suspends the running of the statute of limitations for unnamed class members until a decision is reached whether to certify the class, and that following a denial of certification the statute resumes running again, is applicable to a purported class action brought in federal court seeking relief under 42 U.S.C. § 1983.

2. Whether this Court's decision in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), precludes application of the rule of *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), to purported class actions brought in federal court seeking relief under 42 U.S.C. § 1983.

PARTIES TO THE PROCEEDING

The petitioners are Carlos Chardon, individually, Maria Socorro Lacot, as the current Secretary of Public Education for the Commonwealth of Puerto Rico (by automatic substitution when Mr. Chardon, who was sued individually and as Secretary of Education, resigned his position), and Oscar Ramos, individually and as the Assistant Secretary for Personnel of the Department of Education of the Commonwealth of Puerto Rico.

The respondents are the following thirty-six persons, whose cases were considered in one appeal below, Nos. 81-1567 and 81-1607:

1. Aurora Sierra Pizarro
2. Virginia Otero Arroyo
3. Juan Fumero Soto
4. Dora Castro de Aguilar
5. Reinaldo Rodriguez Solivan
6. Elba Rosario de Bravo
7. Ramon Norat Zayas
8. Charles H. Quiles Mariani
9. Bienvenido Rivera Diaz
10. Carmen M. Morales Hernandez
11. Juan Rivera Pagan
12. Joaquin Cruz Mendez
13. Ursula Aguilar Quintero
14. Aminta Rivera Cardona
15. Roberto Cruz Cruz
16. Nelson Velez Quinones
17. Cristina Cancel Cuevas
18. Maria D. Guerro Navarro
19. Francisco Bonilla Ocasio
20. Heriberto Gallardo Gutierrez
21. Julio E. Colon
22. Aida Rodriguez Rios

23. Carmen Nunez Rivera
24. Carmen L. Negron Marin
25. Carmen Garcia Rosado
26. Noelia Torres de Cantres
27. Antonio Rodriguez Rivera
28. Jose E. Aponte de la Torre
29. Carmen H. Montez Velez
30. Nilsa Cardona Flores
31. Elba M. Colon Torres
32. Ana Mercedes Ortiz Colon
33. Sylvia M. Denis
34. Bienvenido Castro del Valle
35. Santiago Gonzalez Velasquez
36. Angela Colon Santiago

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BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the court below dated June 8, 1982, is reported at 681 F.2d 42 and is reproduced in the Joint Appendix ("J.A.") at pages 125a-157a. That court's unreported order of July 6, 1982, modifying its judgment of June 8, 1982, is reproduced at J.A. 158a. The court's unreported orders of July 6, 1982, and July 28, 1982, denying the petitions for rehearing of petitioners herein, are reproduced at J.A. 159a-160a and 161a, respectively.

The May 7, 1981, opinion of the district court, which was reviewed on appeal by the court below, is reported at 514 F. Supp. 339 and is reproduced at J.A. 87a-107a. The district court's unreported order of May 7, 1981, which accompanied its opinion, is reproduced at J.A. 84a-86a. The district court's unreported Final Order and Judg-

ment, dated July 24, 1981, is reproduced at J.A. 108a-111a. The unreported judgment entered by the Clerk of the district court in accordance with the Final Order and Judgment, dated July 29, 1981, is reproduced at J.A. 114a-116a. The district court's unreported order of January 7, 1982, entered *nunc pro tunc* to July 29, 1981, is reproduced at J.A. 121a-124a.

JURISDICTION

The judgment of the court below was entered on June 8, 1982. Petitioners' filed a Petition for Rehearing which was denied on July 6, 1982. (J.A. 159a) Eight respondents filed a Petition for Rehearing and Modification of Judgment which the court below granted on July 6, 1982, modifying its judgment accordingly. (J.A. 158a) Petitioners thereafter filed a Petition for Rehearing on Modification of Judgment which the court below denied on July 28, 1982. (J.A. 161a) Petitioners filed their petition for writ of certiorari on August 16, 1982. The petition was granted by this Court on November 8, 1982. (J.A. 162a) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 (Supp. IV 1980)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Col-

umbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988 (Supp. IV 1980)

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

These thirty-six consolidated civil rights cases are related to the cases decided by this Court last term in

Chardon v. *Fernandez*, 454 U.S. 6 (1981),[1] and arose out of essentially the same facts. (J.A. 127a)

The petitioners are Carlos Chardon, individually, Maria Socorro Lacot, the current Secretary of Public Education (by automatic substitution when Mr. Chardon resigned that position), and Oscar Ramos, individually and as the Assistant Secretary for Personnel of the Department of Education.

The respondents held non-tenured administrative positions in the Puerto Rico Department of Education for the 1976-77 school year. (J.A. 127a) These respondents were notified—on or after June 17, 1977—that their appointments would not be renewed for the 1977-78 school year and that, instead, they would be reinstated to the tenured teaching positions they had previously held in the Department. (J.A. 127a, 155a, 158a)

On June, 19, 1978, Jose Ortiz Rivera, not a respondent herein,[2] filed a purported class action against Chardon and Ramos in the United States District Court for the District of Puerto Rico. (J.A. 128a) Ortiz Rivera claimed that the Department of Education had failed to reappoint him, and the members of the class he purported to represent, because of their political affiliation. (J.A. 13a, 128a)

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[1] In *Fernandez*, this Court reversed the judgments previously entered by the Court of Appeals for the First Circuit and remanded the cases for further proceedings. 454 U.S. at 8. On remand, the Court of Appeals decided the *Fernandez* cases and the instant *Fumero Soto* cases in the same opinion. (J.A. 126a, 127a)

[2] Ortiz Rivera was named as a respondent in the petition for writ of certiorari. This Court, however, limited the writ of certiorari to questions 1 and 2 presented in the petition, thus denying the writ as to the third question. Questions 1 and 2 did not involve Ortiz Rivera; Question 3 pertained solely to the timeliness of his complaint. Accordingly, Ortiz Rivera is not a respondent herein.

Ortiz Rivera sought relief under 42 U.S.C. § 1983 and asserted pendent claims under 18 L.P.R.A. §§ 214, 249a, 249e. (J.A. 128a) Jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331, 1343(3) and (4), 2201 and 2202. (J.A. 7a)

On August 21, 1978, the district court denied class certification on the ground that the class was not so numerous as to make joinder impracticable. (J.A. 16a, 128a-129a) No appeal, either interlocutory or after the entry of final judgment in the case, was taken from this denial of certification. On October 5, 1978, Ortiz Rivera moved the district court for leave to amend his complaint to name one hundred twenty of the purported class members as co-plaintiffs in his suit. (J.A. 29a) That motion was denied on November 24, 1978. (J.A. 49a) This ruling also was not appealed. Thereafter, on dates ranging from January 10 to January 31, 1979, ninety individual plaintiffs, including the respondents herein, filed separate complaints under Section 1983, thus bringing to ninety-one the total number of separate lawsuits then pending in the district court. Chardon and Ramos filed an answer in each case, and in each such answer stated as an affirmative defense that the action was barred by the applicable statute of limitations. (J.A. 80a, 131a)

In Puerto Rico, the limitations period applicable to a claim under 42 U.S.C. § 1983 is one year. 31 L.P.R.A. §5298(2). (J.A. 131a) The district court initially dismissed thirty-six cases as time-barred. (J.A. 130a) In each of those cases the plaintiff had received notice of the non-reappointment decision more than one year before Ortiz Rivera filed his purported class suit.[3] (J.A. 144a) These

[3] Thus, the filing of the purported class action could have had no tolling effect on the running of the statute of limitations for those plaintiffs.

cases became the *Fernandez* cases, in which the Court of Appeals for the First Circuit held that the limitations period began to run, not when notice of non-reappointment was received, but when the plaintiffs' appointments ended. *Fernandez* v. *Chardon*, 648 F.2d 765 (1st Cir. 1981). This Court reversed, holding that the plaintiffs' causes of action under Section 1983 accrued on the dates that they were "notified . . . that a final decision had been made to terminate their [temporary] appointments." *Chardon* v. *Fernandez*, 454 U.S. at 8. As noted above, this Court remanded the *Fernandez* cases for further proceedings.

After the *Fernandez* cases had been dismissed by the district court, and while those cases were on appeal, the remaining fifty-five individual cases—the *Fumero Soto* cases—were consolidated for trial. (J.A. 130a) The district court bifurcated the trial into liability and damage phases, reserving its decision on the statute of limitations defense. (J.A. 130a) After trial in January 1981, the jury returned a verdict in favor of plaintiffs on the question of liability. (J.A. 130a) Thereafter, in light of the jury's answers to certain interrogatories, the district court found Chardon and Ramos immune from individual liability, but ordered the Department of Education to reinstate all the plaintiffs to their previous administrative positions with full back pay. (J.A. 130a-131a) Judgments were entered accordingly.[4] (J.A. 108a, 121a) Petitioners herein appealed asserting, *inter alia*, that all the suits

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[4] The district court, in entering judgment, necessarily rejected the statute of limitations defense on which it had reserved decision prior to trial.

were filed after the statute of limitations had expired and were thus time-barred.[5]

The court below issued its opinion on June 8, 1982, deciding the remanded *Fernandez* cases,[6] together with the *Fumero Soto* cases. With respect to the *Fernandez* cases, the court vacated the judgments it had previously entered and remanded those cases to the district court with instructions to dismiss. (J.A. 155a) With respect to the *Fumero Soto* cases, the court reversed twenty-six of them and remanded them to the district court with instructions to dismiss. (J.A. 155a) The plaintiffs in those cases were in precisely the same position as the *Fernandez* plaintiffs (*i.e.*, their one-year limitations period had expired before the class suit was filed) and they were therefore found to be time-barred. (J.A. 144a)

As to the remaining *Fumero Soto* plaintiffs, who had received notice after June 19, 1977, the court found their suits to have been timely filed and remanded them to the district court for assessment of compensatory damages

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[5] Petitioners also appealed on the grounds that the district court erred in refusing to enter judgment for them notwithstanding the verdict, and that the back pay award entered against the Department of Education violated the Eleventh Amendment to the United States Constitution. Respondents cross-appealed contending that the defendants below did not enjoy individual immunity. The court below did not find error in the district court's refusal to grant judgment notwithstanding the verdict, but reversed the back pay award, finding it in violation of the Eleventh Amendment. (J.A. 154a)

[6] After this Court issued its decision in *Fernandez*, the court below directed the parties to submit briefs on the question whether the statute of limitations had been tolled in any of those cases and whether that issue should be certified to the Supreme Court of Puerto Rico. The court below concluded that no tolling had occurred, and that the issue did not need to be certified. (J.A. 143a-144a)

against the individual defendants, Chardon and Ramos.[7] (J.A. 144a, 154a, 155a) The court held that it was bound to apply Puerto Rico law, rather than the federal rule of *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), in resolving this issue. Based on its interpretation of Puerto Rico law, the court held that the filing of the class suit by Ortiz Rivera tolled the running of the statute of limitations as to all unnamed class members, and that, after class certification was denied, each unnamed class member then had another full year within which to bring suit. (J.A. 136a, 144a)

Chardon and Ramos petitioned for rehearing, *inter alia*, on the ground that the court had erred in looking to Puerto Rico law, rather than applying the federal rule, to determine the effect of the denial of class certification on the unnamed class members. The court denied the petition on July 6, 1982. (J.A. 159a)

Eight of the *Fumero Soto* plaintiffs whose judgments had been reversed also petitioned for rehearing and modification of judgment on the ground that their complaints were not time-barred, even though they had received notice of non-reappointment on June 17, 1977—more than one year prior to the filing of the class suit. They argued that since June 17, 1978—the date on which the one-year limitations period expired in their cases—fell on a Saturday, they were entitled under Puerto Rico law to benefit from the filing of the class suit on Monday, June 19, 1978. The plaintiffs had advanced as authority for their position, 1 L.P.R.A. § 72, which provides:

> "The time in which any act provided by law is to be done is computed by excluding the first day, and

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[7] The mandate of the court below has been stayed pending final disposition by this Court. *See* Rule 41, Fed. R. App. P. (J.A. 161a)

including the last, unless the last day is a holiday, and then it is also excluded."

Without offering petitioners an opportunity to respond, the court below granted plaintiffs' petition and modified its judgment accordingly, thus bringing to thirty-seven the number of plaintiffs held to have timely filed their complaints. (J.A. 158a) Chardon and Ramos petitioned for rehearing on the modification of judgment, pointing out that plaintiffs failed to mention, or even acknowledge, 1 L.P.R.A. § 71, which defines "[h]olidays, within the meaning of sections 71-73" of Title 1. Saturdays are not included in that definition. The court on July 28, 1982, denied the petition, holding that the federal rules controlled, and that Fed. R. Civ. P. 6 expressly excludes Saturdays from such computations and Fed. R. App. P. 26 contains the same exclusion. (J.A. 161a)

SUMMARY OF ARGUMENT

In *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), this Court determined the effect of both the filing of a proposed class action and a subsequent denial of class certification on the running of a statute of limitations. This Court held that when a complaint proposing a class action is filed, it has the effect of tolling the statute of limitations for all unnamed members of the proposed class. The statute of limitations is suspended for the period of time it takes the district court to determine whether a class action may appropriately proceed. If class certification is denied, the limitations period for each unnamed member of the proposed class resumes running, and such persons must successfully intervene in the ongoing individual action during the time remaining in that period in order to preserve their causes of action. The court below recognized and understood the *American Pipe* rule. It rejected application of the rule, however,

finding that in this action, initiated as a proposed class action under 42 U.S.C. § 1983, it was bound to apply state law to determine the effects of the class action complaint and the denial of class certification on the applicable state statute of limitations.

The decision of the court below was purportedly based on this Court's holding in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980). The court below failed to recognize that this case is distinguishable from *Tomanio*, since it was initiated as a class action, thus bringing it squarely under the federal procedural rule established in *American Pipe*. In addition, the court below failed to note that the result in *Tomanio* was dictated by 42 U.S.C. § 1988 and that, in this case, Section 1988 dictates application of the federal rule of *American Pipe*. Finally, other important federal policies which supported the application of state law in *Tomanio*, support application of the federal rule of *American Pipe*, rather than state law, in this case.

ARGUMENT

I. Respondents' Actions Are Time-Barred Under The Rule Of *American Pipe*

As noted above, Ortiz Rivera filed the purported class action on June 19, 1978. (J.A. 128a) On that date, the purported class members, including respondents herein, had between one day and one hundred thirty-eight days remaining in their respective limitations periods. (J.A. 132a) On August 21, 1978, the district court denied class certification, finding that the asserted class was not so numerous as to make joinder impracticable. (J.A. 16a, 128a-129a) After the denial of class certification, none of the respondents moved to intervene in Ortiz Rivera's individual suit. Instead, on dates between January 10 and

January 31, 1979—more than one hundred thirty-eight days after class certification was denied—each respondent herein filed a separate complaint against Chardon and Ramos. (J.A. 2a-4a, 132a) Under this Court's decision in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), the statute of limitations had thus run against all of the respondents, and their complaints are time-barred.

In *American Pipe*, the State of Utah, with eleven days remaining in the applicable one-year limitations period, filed an antitrust class action purporting to represent various state and local government entities. There, as here, the district court refused to certify the class on the ground that it was not so numerous as to make joinder impracticable. Between the time the original suit was filed and the date class certification was denied, the applicable limitations period expired. Unlike the instant case, however, some eight days after the denial of class certification—and thus within the eleven days which remained in the limitations period on the date the class suit was filed—various members of the purported class moved to intervene in Utah's original suit. The district court denied these motions on the ground that they were untimely. The Court of Appeals for the Ninth Circuit reversed. This Court, in affirming the Ninth Circuit, stated as follows:

> "[A]t least where class action status has been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." 414 U.S. at 552-53.

Thus, in *American Pipe* this Court established the effect of both the filing of a proposed class action and the denial of class certification on the running of a statute of limitations.

The court below clearly recognized that if the rule of *American Pipe* were applied in the instant case, all of the unnamed class members would be time-barred:

> "Under *American Pipe*, the one-year statute of limitations would have been tolled on June 19, 1978, when Ortiz Rivera filed his class action. The tolling would have ended, and the remaining portion of the limitations period would have recommenced running on August 21, 1978, when the district court declined to certify the class. Over half the plaintiffs in [the *Fumero Soto* and *Fernandez* cases combined] had received notice of demotion more than one year before Ortiz Rivera filed suit, so their claims would already have been time-barred. *The remaining plaintiffs would have had from one to one hundred and thirty-eight days to file individual complaints after August 21, 1978. The earliest individual complaints were not filed, however, until January 10, 1979, after expiration of the remaining one hundred and thirty-eight day period.*" (J.A. 132a) (emphasis added).

Although the court was generally correct in stating the rule of *American Pipe*,[8] and clearly understood what it

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[8] The tolling rule of *American Pipe* appears to extend only to unnamed members of the purported class "who make timely motions to intervene after the [district] court has found the suit inappropriate for class action status." *Id.* The lower federal courts are divided on the question of whether individuals who do not intervene in the original suit, but who file timely separate actions after class certification is denied, may avail themselves of the tolling rule established in *American Pipe*. Regardless of how that question is resolved, *cf. Parker* v. *Crown, Cork & Seal Co.*, 677 F.2d 391 (4th Cir.), *cert. granted*, No. 82-118, 51 U.S.L.W. 3352-53 (November 9, 1982), there

would mean to apply that rule in the instant case, it nevertheless held that in actions brought under 42 U.S.C. § 1983, the federal rule of *American Pipe* is not applicable since, in its view, the tolling issue should be governed by state law. (J.A. 133a, 134a) In that respect the court erred. The decision in *American Pipe* clearly controls the tolling issue in this case.

In *American Pipe*, this Court addressed "an aspect of the relationship between a statute of limitations and the provisions of Fed. Rule Civ. Proc. 23 regulating class actions in the federal courts." 414 U.S. at 540. The rule adopted by this Court was described as "the rule most consistent with federal class action procedure." *Id.* at 554. The Court further stated that "this interpretation of [Rule 23] is . . . necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve." *Id.* at 555-56. In short, in *American Pipe* this Court established a uniform federal procedural rule applicable to class actions brought in the federal courts, and it has consistently been so interpreted and applied.[9]

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is no question in the instant case that if the rule of *American Pipe* applies, all of the respondents are time-barred, since none of them either intervened or filed an individual action within the time remaining in their respective limitations periods after class certification was denied.

[9] The tolling rule of *American Pipe* has been applied in a wide variety of contexts, including Section 1983 cases, *e.g.*, *Pavlak* v. *Church*, 681 F.2d 617, 618-20 (9th Cir. 1982), *petition for cert. filed*, No. 82-650, 51 U.S.L.W. 3320 (October 12, 1982); *Paxman* v *Campbell*, 612 F.2d 848, 855 (4th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1129 (1981); *McCarthy* v. *Kleindienst*, 562 F.2d 1269, 1272-75 (D.C. Cir. 1977); *Morton* v. *Charles County Board of Education*, 373 F. Supp. 394, 396 (D. Md. 1974), *aff'd*, 520 F.2d 871 (4th Cir.), *cert. denied*, 423 U.S. 1034 (1975); cases brought under the federal securities acts, where, as in Section 1983 cases, state statutes of limita-

Thus, in *Pavlak* v. *Church*, 681 F.2d 617 (9th Cir. 1982), *petition for cert. filed*, No. 82-650, 51 U.S.L.W. 3320 (October 12, 1982), a case strikingly similar to the instant case, and one brought under Section 1983, the Ninth Circuit emphasized that "[t]here is need for procedural uniformity in all class actions in federal courts and under this principle the federal rule [of *American Pipe*], not the state law, governs the tolling issue relevant here." *Id.* at 619 (citation omitted). The decision in *Pavlak*, which is in direct conflict with the decision of the court below, is clearly the better rule. Indeed, there are sound reasons why the filing of a class action complaint and the subsequent denial of class certification, where class treatment is found inappropriate, should have the same effect in every federal class suit, whether brought under Section 1983 or some other statute.

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tions are applied, *e.g.*, *Wood* v. *Combustion Engineering, Inc.*, 643 F.2d 339, 346-47 (5th Cir. 1981); *Stull* v. *Bayard*, 561 F.2d 429, 433 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *Arneil* v. *Ramsey*, 550 F.2d 774, 782 (2d Cir. 1977); *Wachovia Bank & Trust Co.* v. *National Student Marketing Corp.*, 461 F. Supp. 999, 1011-12 (D.D.C. 1978), *rev'd on other grounds*, 650 F.2d 342 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); and in many other types of cases as well, *e.g.*, *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 391-92 (1977); *Parker* v. *Crown, Cork & Seal Co., Inc.*, 677 F.2d 391, 393-94 (4th Cir.), *cert. granted*, No. 82-118, 51 U.S.L.W. 3352-53 (November 9, 1982); *Jefferson* v. *H. K. Porter Co.*, 485 F. Supp. 356, 360-61 (N.D. Ala. 1980), *aff'd*, 648 F.2d 337 (5th Cir. 1981); *Green* v. *United States Steel Corp.*, 481 F. Supp. 295, 299 (E.D. Pa. 1979) (Title VII cases); *Appleton Electric Co.* v. *Graves Truck Line, Inc.*, 635 F.2d 603, 609-10 (7th Cir. 1980), *cert. denied*, 451 U.S. 976 (1981) (I.C.C. rate refund enforcement); *Bantolina* v. *Aloha Motors, Inc.*, 75 F.R.D. 26, 32-33 (D. Hawaii 1977) (Truth-In-Lending); *Wright* v. *Califano*, 603 F.2d 666, 669 n.8 (7th Cir. 1979), *cert. denied.*, 447 U.S. 911 (1980) (Social Security Act benefits); *Stoddard* v. *Ling-Temco-Vought, Inc.*, 513 F. Supp. 314, 329 (C.D. Cal. 1980) (Suits in Admiralty Act wrongful death); *Haas* v. *Pittsburgh National Bank*, 526 F.2d 1083, 1096-98 (3d Cir. 1975) (state and federal banking statutes).

Indeed, in *American Pipe*, this Court emphasized that Rule 23, Fed. R. Civ. P., where appropriately utilized, provides for a much-favored form of adjudication of disputes between multiple parties on one side and a single party on the other. Class actions serve the important values of judicial efficiency and economy by eliminating the need for a multiplicity of individual suits which are substantially similar, if not identical, in terms of the facts presented, the relief sought, and the legal principles to be applied.

The Court recognized in *American Pipe* that the salutary objectives and effects of Rule 23 would be frustrated but for the tolling rule adopted there. Specifically, the Court recognized that if the running of the statute of limitations on the individual causes of action of "members" of a proposed class was not tolled during the pendency of a court's determination as to whether the class should be certified, such of these "members" as were aware of the suit would file protective motions to intervene or join in the suit prior to such determination, in order to protect themselves from a time-bar if certification was later denied. These protective motions would result in the very multiplicity of individual actions in the courts which the class action mechanism was designed to prevent. As the Court explained:

> "A contrary rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive Rule 23 class actions of the efficiency and economy of litigation which is the principle purpose of the procedure. Potential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable. . . . [A] rule requiring successful anticipation of the determination of the viability of the class would breed needless duplication of motions." 414 U.S. at 553-54.

Thus, the tolling rule of *American Pipe* was adopted primarily for the purpose of protecting the judicial resources of federal district courts in cases where class actions have been proposed, at least until a determination has been made as to whether the case may properly proceed as a class action. This tolling rule does no more than preserve the status quo between the parties for the time it takes a court to decide whether to certify the class.[10]

It would appear that the overriding concerns for the objectives of judicial economy and efficiency are identical in each case in which class treatment is sought. Neither the subject-matter of the cause of action sought to be adjudicated as a class action, nor the source of the statute of limitations governing the cause of action have any bearing on these concerns or objectives. In short, that the proposed class action herein was initiated under 42 U.S.C. § 1983, and that Section 1983 cases are governed by a "borrowed" state statute of limitations, are factors irrelevant to the reasons for tolling during the pendency of a class certification determination.

By the same token, the purpose of the Federal Rules of Civil Procedure is to provide a uniform set of rules to "govern the procedure in the [federal] district courts," Rule 1, Fed. R. Civ. P. That purpose is frustrated if Rule 23 is applied differently from one case to another, depending on whether the underlying cause of action is governed by a state statute of limitations and, if so, what the coordinate tolling rules, if any, dictate as to the effect of the denial of class certification.

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[10] Rule 23(c), Fed. R. Civ. P., provides that, "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."

Furthermore, the application of a uniform federal procedural rule, rather than an otherwise applicable state law, in federal question cases brought in the federal courts, has considerable precedent. For instance, in *Bomar* v. *Keyes*, 162 F.2d 136 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947), an action brought under the predecessor statute to Section 1983, the Second Circuit held that Rule 3, Fed. R. Civ. P., rather than state law, determined when an action was "commenced" for purposes of tolling the applicable state statute of limitations. This Court acknowledged the correctness of that holding in *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), a diversity case. There, this Court distinguished the holding in *Bomar* on the ground that it "was a suit to enforce rights under a federal statute." *Id.* at 533. *Accord Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 751 n. 11 (1980).

Moreover, in diversity cases, where the use of state substantive law is mandated by the doctrine established in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), this Court has nevertheless applied federal law where necessary to give effect to important federal procedural policies. *See, e.g., Hanna* v. *Plumer*, 380 U.S. 460 (1965) (federal rule of procedure governs over conflicting state rule regarding method of service of process in diversity actions); *Byrd* v. *Blue Ridge Rural Electric Co.*, 356 U.S. 525 (1958) (federal rule applied in lieu of state procedural rule that would disrupt the federal system of allocating functions between judge and jury); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941) (federal rules concerning the power of a court to order a party to submit to a physical or mental examination regulated procedure, and would thus apply instead of law of either of the states whose law could be applied in a diversity case).

Finally, both in civil rights cases and in other contexts in which state statutes of limitations are applicable to actions arising under federal statutes, this Court and the lower federal courts have adopted and utilized federal procedural principles even where they are not directly related to policies embodied in the Federal Rules. *See Chardon* v. *Fernandez*, 454 U.S. 6 (1981) *and Delaware State College* v. *Ricks*, 449 U.S. 250 (1980) (determination of when a cause of action accrues, and thus when applicable state statutes of limitations begin to run for actions under 42 U.S.C. §§ 1983 and 1981 is governed by federal law); *Cope* v. *Anderson*, 331 U.S. 461 (1947) *and Rawlings* v. *Ray*, 312 U.S. 96 (1941) (when applicable state statute of limitations begins to run for actions under federal statutes governing insolvent national banks is a federal question); *Chung* v. *Pomona Valley Community Hospital*, 667 F.2d 788, 791 (9th Cir. 1982); *Allen* v. *Amalgamated Transit Union Local 788*, 554 F.2d 876, 880 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973) (applying federal doctrine of "continuing violations" to toll the running of applicable state statute of limitations on actions under 42 U.S.C. § 1981).

In short, there is substantial precedent to support the proposition that "[f]ederal procedural rules will modify the application of state limitations policy in federal question cases." *Pavlak* v. *Church*, 681 F.2d at 619 (citation omitted).[11] Of course, the instant case, brought under 42

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[11] Even in this case, the court below, faced with a conflict between the Federal Rules and the law of Puerto Rico on computation of the state statute of limitations, flatly stated that "the date of filing is controlled by the Federal Rules and Federal Rules of Civil Procedure 6 expressly excludes from computation 'a Saturday, a Sunday or a legal holiday' and Federal Rules of Appellate Procedure 26 contains the same exclusion." (J.A. 161a)

U.S.C. § 1983, is a federal question case and thus the federal procedural rule of tolling established in *American Pipe* is properly applicable. The court below, however, refused to apply the rule of *American Pipe*, holding that, under this Court's decision in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), it was instead required to apply the law of Puerto Rico.

II. This Court's Decision In *Board Of Regents* v. *Tomanio* Does Not Preclude Application Of The *American Pipe* Rule In This Case

In *Tomanio*, the plaintiff filed suit in federal court in New York under 42 U.S.C. § 1983 after the applicable statute of limitations had expired. She claimed that her action was not time-barred because the statute of limitations had been tolled by an earlier action filed in state court. Although New York law did not provide for tolling in the circumstances of her case, the district court nevertheless found that it would be appropriate to toll the running of the limitations period during the pendency of her state court litigation. 446 U.S. at 482. The Court of Appeals for the Second Circuit affirmed, "finding that the tolling of the statute was justified 'in the interests of advancing the goals of federalism.' " *Id.* at 483.

This Court granted certiorari, and reversed. On the basis of previous decisions, particularly *Robertson* v. *Wegmann*, 436 U.S. 584 (1978), and *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975), and its interpretation of the mandate of 42 U.S.C. § 1988 in those cases, this Court found:

> "In § 1983 actions . . . a state statute of limitations and the coordinate tolling rules are more than a technical obstacle to be circumvented if possible. In most cases, they are binding rules of law." 446 U.S. at 484.

Thus, the Court held that the lower courts were bound to apply state tolling rules to determine the tolling effect, if any, of the pendency of plaintiff's attempt to obtain relief in state court, unless the state tolling rules could be found "inconsistent" with federal law. *Id.* at 486. Looking to the relevant provisions of New York law, this Court found no provision which had the tolling effect found appropriate by the courts below. *Id.* Moreover, the policies underlying 42 U.S.C. § 1983, those being compensation of wronged parties and deterrence of unlawful acts violative of constitutional rights, were not found to be compromised by a refusal to toll the statute of limitations in the situation presented. Thus, the Court held that plaintiff's limitations period for her constitutional claim under Section 1983 was not tolled during the pendency of her state court litigation, and that her federal cause of action was time-barred.

Relying on the *Tomanio* decision, the Court of Appeals in the instant case held:

> "[A]pplication of state tolling rules to § 1983 claims is required by 42 U.S.C. § 1988, unless the state rules are inconsistent with the federal policies underlying § 1983. Thus in a § 1983 case, the federal rule and underlying reasoning of *American Pipe* are not generally applicable." (J.A. 134a) (citations omitted).

However, the court's reading of *Tomanio* was far too broad, and the holding in that case does not preclude the application of the "federal rule of *American Pipe*" herein.

Petitioners do not challenge the correctness of this Court's reasoning in *Tomanio*. That case, however, involved an individual suit, not a class action, and implicated no special federal procedural policies. Thus, there was every reason for the Court in that case to "[rely] on

the State's wisdom in setting a limit, and exceptions thereto," *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. at 464, in determining whether or not the applicable state statute of limitations was tolled by the plaintiffs' efforts to obtain relief from another source before bringing her federal cause of action.

Ortiz Rivera, however, filed his suit as a federal class action, thus bringing squarely into play the provisions of Rule 23, Fed. R. Civ. P., and the federal procedural policy embodied therein. As noted by the Ninth Circuit in *Pavlak* v. *Church*, *supra*, "[t]he issue [of] whether state or federal rules of limitation apply *when the reason for tolling arises from federal procedural policy*, was not raised or addressed in *Tomanio*." 681 F.2d at 619 (emphasis added). Since it is only because Ortiz Rivera's suit was filed as a class action that any tolling issue is presented as to respondents in this case, the court below clearly erred in relying on *Tomanio* to resolve that issue.

A. 42 U.S.C. § 1988

In reaching its decision in *Tomanio*, this Court followed the choice of law principles embodied in 42 U.S.C. § 1988, which are generally applicable in Section 1983 cases. Section 1988 provides, in pertinent part, as follows:

> "The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS" . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as

> modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . ." 42 U.S.C § 1988 (Supp. IV 1980).

In *Tomanio*, noting the absence of any statute of limitations in Section 1983, this Court read Section 1988 as requiring the "borrowing" from state law of the limitations period governing the most analogous state law cause of action. 446 U.S. at 483-84. As already noted, *Tomanio* involved an individual action and presented no issues of important federal procedural policy. Thus, the Court could properly apply the general rule that, "[i]n § 1983 actions, a state statute of limitations and the coordinate tolling rules . . . are binding rules of law." *Id.* at 484.

Although Section 1988 required the application of state law in *Tomanio*, it does not require application of state law in this case. Here, unlike there, a governing federal procedural rule exists. Section 1988 provides that federal court jurisdiction in Section 1983 cases, "shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry [civil rights and their vindication] into effect." In *Moor* v. *County of Alameda*, 411 U.S. 693 (1973), in which the Court had occasion to clarify the meaning of Section 1988, the Court reviewed the legislative history of the statute as follows:

> "Section 1988 was first enacted as a portion of § 3 of the Civil Rights Act of April 9, 1866, c. 31, 14 Stat. 27. . . . The initial portion of § 3 of the Act established federal jurisdiction to hear, among other things, civil actions brought to enforce § 1 [now 42

> U.S.C. § 1982]. *Section 3 then went on to provide that the jurisdiction thereby established should be exercised in conformity with federal law where suitable and with reference to the common law, as modified by state law, where federal law is deficient.*" 411 U.S. at 705 (emphasis added; footnote omitted).

It is clear both from the statute itself, and from the foregoing clarification, that resort to state law under Section 1988 is necessary only where federal law is somehow inadequate. This view was reiterated in *Tomanio*, where this Court noted that, "[i]n 42 U.S.C. § 1988, Congress 'quite clearly instructs [federal courts] to refer to state statutes' *when federal law provides no rule of decision for actions brought under § 1983.*" 446 U.S. at 484 (emphasis added; citations omitted).

Under these principles, it is clear that the federal rule of *American Pipe*, and not Puerto Rico law, provides the "rule of decision" to be applied to the tolling issue presented in this case.

This conclusion is supported by the analysis contained in *Cohen* v. *Board of Education of East Ramapo Central School District*, 536 F. Supp. 486 (S.D.N.Y. 1982). In *Cohen*, the court followed the holding of *Bomar* v. *Keyes*, *supra*, rejecting the defendants' assertion that under *Tomanio*, state law had to be followed in determining when plaintiff's action was "commenced" for purposes of tolling the applicable state statute of limitations. In distinguishing *Tomanio* and the precedents upon which that decision rests, the court stated:

> "The federal action cases, *Johnson* [v. *Railway Express Agency*], *Robertson* [v. *Wegmann*], and *Tomanio*, have all applied state law in areas in which federal law was deficient—*Johnson*: in respect to the effect of the filing of an EEOC complaint, *Robertson*: in respect to the death of a plaintiff, and *Tomanio*: in

> respect to the prosecution of an independent state action. *The deficiency in those cases was the absence of any federal law on the issue.* The issue became whether the state rule used to correct the deficiency was inconsistent with the Constitution or federal law. 42 U.S.C. § 1988 (1976). *In the present case, however, federal law does provide a solution and it is unnecessary to resort to state law.* Fed. R. Civ. Proc. 3 provides that '[a] civil action is commenced by filing a complaint with the court.' *Because federal law is not deficient on this subject, state law does not apply." Id.* at 495 (emphasis added; citations omitted).

Just as in *Cohen*, the federal rule of *American Pipe* "does provide a solution and it is unnecessary to resort to state law" in the instant case.

B. Relevant Federal Policies

As demonstrated above, Section 1988 does not require the application of Puerto Rico law in this case; neither do the important federal policies addressed in *Tomanio*—uniformity, federalism, and repose.

Uniform application of the federal procedural rule established in *American Pipe* does not contradict *Tomanio*, where this Court refused to displace the state tolling rule in favor of an ad hoc federal rule solely to foster uniformity in Section 1983 cases. Citing similar analysis in *Robertson* v. *Wegmann*, the Court noted that since Section 1988 requires the use of state law under some circumstances in Section 1983 cases, non-uniformity is a necessary consequence of the statutory scheme. Thus, "the value of nationwide uniformity in areas of civil rights enforcement" was not seen as justification for adoption of an ad hoc federal common law tolling rule. 446 U.S. at 489.

It has been demonstrated here that Section 1988 does not require adoption of state law. Moreover, the argu-

ment for uniformity in this case transcends the subject-matter of the underlying cause of action. Procedural uniformity in the administration of federal class actions is appropriate regardless of the substance of the action in which Rule 23 is invoked. Such procedural uniformity is plainly not inconsistent with *Tomanio*.

Application of the uniform procedural rule in this case would not in any way compromise or infringe upon the policies underlying Section 1983. In *Robertson* v. *Wegmann*, *supra*, the Court identified those policies as follows:

> "The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." 436 U.S. at 590-91 (citations omitted).

Accord Board of Regents v. *Tomanio*, 446 U.S. at 488. The federal rule of *American Pipe* is entirely compatible with the policies of compensation and deterrence. Specifically, the tolling aspect of *American Pipe* protects the causes of action of all unnamed members of a potential Section 1983 class, until a court has the opportunity to determine the appropriateness of class treatment. Then, if class certification is denied, the members of the purported class still have as much time to take some action to protect their rights as they had when the class action complaint was filed. Clearly, this process is well suited for the vindication of civil rights.[12] This Court noted in *Toma-*

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[12] That the tolling aspect of the *American Pipe* rule comports with Section 1983 actions is demonstrated by its adoption and application as "Puerto Rico law" by the court below in this case. Generally, evidence of the compatibility of the *American Pipe* rule in its entirety with remedial principles like those embodied in Section 1983 is found in the uniform application of the rule in Title VII cases. *See, e.g.*, cases cited in n. 9, *supra*.

nio, addressing the state law which did not provide for tolling:

> "Neither of [the policies of compensation and deterrence] is significantly affected by this rule of limitations since plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their actions within three years." 446 U.S. at 488.

Similarly, *American Pipe* places no burden on plaintiffs' rights. They must do no more, after denial of class certification, than they would have had to do if a class suit had not been attempted—*i.e.*, take action to protect their rights within the time provided by the statute of limitations.

A second general federal policy discussed in *Tomanio* is federalism. In fashioning a federal tolling rule in that case, the two lower courts apparently believed that adoption of the New York tolling rule would undermine federalism because litigants would not be encouraged to resort first to state remedies. Rejecting this view, this Court stated:

> "We believe that the application of the New York law of tolling is in fact more consistent with the policies of 'federalism' invoked by the Court of Appeals, than a rule which displaces the state rule in favor of an ad hoc federal rule. The result reached by the District Court and Court of Appeals might encourage more plaintiffs with both state and federal constitutional claims to initially bring an action in the state courts. But it would just as surely frustrate the often complex combination of limitations and tolling provisions enacted by the State in question. While New York might have chosen a tolling rule designed to encourage prior resort to state-law remedies, it has not. Here New York has expressed by statute its disfavor of tolling its statute of limitations for one

> action while an independent action is being pursued. . . . the Court of Appeals' rule allowing tolling can scarcely be deemed a triumph of federalism when it necessitates a rejection of the rule actually chosen by the New York Legislature." 446 U.S. at 491-92 (citations omitted).

While this analysis at first blush seems to lend support to the court below in its look to Puerto Rico law, rather than application of *American Pipe*, closer scrutiny confirms that the court below clearly erred.

In *Tomanio*—unlike in the instant case—no "federal rule of decision" controlled the tolling issue presented. See Argument, pp. 21-24, *supra*. Under Section 1988, therefore, this Court properly looked to state law. Once there, the Court found that the applicable state tolling rule did not include any provision which would toll the statute of limitations for respondent's federal constitutional claims under Section 1983 during the pendency of her attempt to obtain analogous but different relief in the New York state courts. The Court found the absence of such a provision to represent a conscious choice of the State not to allow tolling in such situations. The Court concluded that enforcing this state choice would better foster federalism and rejected the federal common law tolling rule created by the lower courts.

Similarly, in this case, even assuming that reference to state law were appropriate, there is no statute or judicial decision in Puerto Rico which provides any basis for tolling the running of a statute of limitations for unnamed class members. The court below candidly conceded this point, noting that "[t]he question here is whether a class action is different from an individual complaint—at least as to unnamed plaintiffs in the class action. . . . The Puerto Rico Supreme Court has not ruled on this question,"

(J.A. 134a) and asserting that "in a § 1983 case, the federal rule and underlying reasoning of *American Pipe* are not generally applicable. In the instant case, though, *there is no discernible state rule.*" (J.A. 134a-135a) (emphasis added; citation omitted).

Thus, faced with exactly the situation which the lower courts in *Tomanio* had faced, the court below then searched for some basis to save respondents' causes of action. Instead of fashioning an ad hoc federal tolling rule—an approach expressly disfavored by this Court in both *Tomanio* and *Robertson* v. *Wegmann*, *supra*—the court below created and applied a wholly novel and unprecedented interpretation of Puerto Rico law in order to find respondents' individual actions timely filed. This approach finds no support in *Tomanio*.

As noted above, nothing in the applicable Puerto Rico tolling statute, 31 L.P.R.A. § 5303,[13] suggests that the filing of a class action complaint has the effect of tolling the statute of limitations for unnamed purported class members or that the denial of class certification will have the effect of starting the limitations period running anew for such persons. Under this Court's reasoning in *Tomanio*, the absence of such provision should have been viewed as evidence of the Commonwealth's determination that there is to be no tolling under the circumstances presented in this case, not as an invitation to create some tolling rule. Instead, asserting that the Puerto Rico class action rule was modeled on Federal Rule 23, the court below held that as a matter of Puerto Rico law, the filing

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[13] Section 5303, provides as follows:

"Prescription of actions is interrupted by their institution before the courts, by extrajudicial claim of the creditor, and by any act of acknowledgement of the debt by the debtor." 31 L.P.R.A. § 5303 (1968).

of the class action complaint would have the same effect as under the *American Pipe* rule—tolling the statute of limitations for all unnamed members of the purported class. Then, despite the fact that Section 5303 has *never* been interpreted to extend to anyone beyond the person who actually institutes an action before the courts, and even then "only with regard to identical causes of action," (J.A. 134a) the court below held that the denial of class certification had the effect of giving all unnamed class members a whole new one-year period within which to bring suit. (J.A. 136a) Creation of this ad hoc Puerto Rico tolling rule is in substance no different from the creation of an ad hoc federal tolling rule by the lower courts in *Tomanio*. Both approaches are wrong. The court below should have instead applied the well-settled uniform federal procedural rule established in *American Pipe*.

Finally, in *Tomanio*, as in many previous decisions, this Court addressed the important federal policy of repose. *See also American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 554-55 (1974); *Burnett* v. *New York Central Railroad Co.*, 380 U.S. 424, 428 (1965); *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). That policy, embodied in statutes of limitations, was explained as follows:

> "[T]he theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *American Pipe*, 414 U.S. at 554, *quoting Order of Railroad Telegraphers*, 321 U.S. at 349.

In the instant case, as the court below noted, when class certification was denied on August 21, 1978, the individual respondents, if *American Pipe* applies, had from one day to one hundred thirty-eight days remaining in their individual one-year limitations periods in which to

take action to prosecute their civil rights claims. (J.A. 132a) Defendants' rights to repose thus vested as to each respondent on the various dates within that period on which the statute of limitations expired on each individual cause of action. Under the court's ruling below, however, all of the respondents received an additional 365 days in which to take action to protect their rights.[14] Having thus defeated defendants' rights to repose, the court nevertheless declared that, "the class action . . . did not disturb any protected repose defendants enjoyed with respect to § 1983 claims, and commencement of a new limitations period after the pendency of the class action would not interrupt any further repose." (J.A. 136a) That statement not only contains an erroneous conclusion of law, but clearly ignores reality.[15]

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[14] As pointed out in n. 8, *supra*, the court below went beyond this Court's holding in *American Pipe* by allowing respondents herein to file individual suits after the denial of class certification, rather than limiting them to timely intervention.

[15] The phrase "after the pendency of the class action" is premised on an erroneous view of the applicable law. The tolling principle of *American Pipe*, adopted and applied by the court below as a matter of Puerto Rico law, does not have the effect of creating a class action. *American Pipe*, by means of a legal fiction, allows a suit to be treated as representative in nature for only so long as it takes the district court to decide whether it can actually proceed as a class action. It is clear, however, that in order for a suit to become a class action, it must satisfy all of the standards of Rule 23(a), fall into one of the three categories provided for in Rule 23(b), and be certified as such under Rule 23(c). Having failed to satisfy at least one of the threshold standards of Rule 23(a) (numerosity), this action could not be certified and was never a class action.

Concerning the assertion that the awarding of a new limitations period "would not interrupt any further repose," a brief review of the record will demonstrate just how incorrect this is. The court noted that respondents had from one to one hundred thirty-eight days in

American Pipe makes clear that the policy of repose will be qualified where necessary to give effect to other important federal interests. In this case, however, application of the *American Pipe* rule would, in the words of the court below in addressing a different issue, "give greater protection to defendants' repose without unduly limiting plaintiffs' ability to sue." (J.A. 140a) As previously discussed, the *American Pipe* rule is entirely compatible with the remedial purposes of Section 1983 and of civil rights legislation generally. It places no burden on Section 1983 plaintiffs beyond that which already rests on them—to exercise due diligence to protect their rights during the time allotted by the applicable statute of limitations. This respondents herein failed to do.

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which to act after denial of certification under the *American Pipe* rule. A breakdown of the actual remaining periods presents a much more realistic picture. One respondent had 138 days, but no other respondent had more than 50 days. Of these, one respondent had 50 days, one had 42 days, and two had 22 days. Of the remaining respondents, ten had between 11 and 17 days. Thirteen respondents had between one and five days. Finally, as reviewed previously, eight respondents were already out of time when the purported class action was filed. They were saved only because, since their limitations periods expired on June 17, 1978, a Saturday, they were extended until the following Monday, June 19, 1978, the date on which the complaint herein was filed. Thus, but for the ruling below, defendants' rights to repose would have vested long before January 10, 1979, the date on which the first among these respondents finally filed their individual suits.

Moreover, the court's attempt to gloss over this grossly unfair result by suggesting that, "defendants are Puerto Rican, and there is no unfair surprise in following Puerto Rican law," *Id.* (J.A. 136a), is wholly disingenuous. Defendants could hardly have anticipated the result reached, since the novel and unprecedented "Puerto Rican" rule of decision never existed until its creation by the First Circuit *in this case.*

Thus, uniformity, federalism, and repose, important federal policies accorded decisional significance by this Court in *Tomanio*, not only do not require the application of Puerto Rico law in this case, but rather militate in favor of using the federal rule of *American Pipe*.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the judgment entered by the United States Court of Appeals for the First Circuit in this case.

Respectfully submitted,

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